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In The
SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

No. 78-367

ROGER W. QUIGLEY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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INDEX

Opinions Below ---------- 2

Jurisdiction ---------- 2

Questions Presented ---------- 2

Constitutional Provision Involved---------- 3

Statement of the Case ---------- 3

Reasons for Granting the Writ ---------- 16

Conclusion ---------- 41

Appendix A, Judgment Order, Court of Appeals for the Third Circuit ---------- 1a

Appendix B, Memorandum Opinion ---------- 3a

TABLE OF CITATIONS

Cases	Page
Abney v. United States, 431 U.S. 651 (1977)	2, 35, 39
Arizona v. Washington, ____U.S. ____, 98 S.Ct. 824 (1978)	17, 18, 35 38, 39
Downum v. United States, 372 U.S. 734 (1963)	20
Gori v. United States, 367 U.S. 364 (1961)	20
Illinois v. Somerville, 410 U.S. 458 (1972)	20
Lee v. United States, 432 U.S. 23 (1977)	19, 20, 37
United States v. Archie, 452 F.2d 897 (3rd Cir. 1971, cert. denied, 405 U.S. 1071	38
United States v. Broderick, 425 F. Supp. 93 (S.D.Fla. 1977)	26, 27, 28, 29, 31, 32, 33, 34
United States v. Cerilli, 558 F.2d 697 (3rd Cir. 1977)	21, 22
United States v. Dinitz, 424 U.S. 600, (1976)	19, 20, 37
United States v. DiSilvio, 520 F.2d 247 (3rd Cir. 1975)	21

TABLE OF CITATIONS

Cases	Page
United States v. Grasso, 552 F.2d 46 (2nd Cir. 1977)	22
United States v. Jorn, 400 U.S. 470 (1970)	17, 19, 20
United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976)	21, 23, 24, 27, 28, 33, 34, 40
United States v. Martin, 561 F.2d 135 (8th Cir. 1977)	18, 21, 25, 27, 28, 33, 34, 40
United States v. Perez, 9 Wheat. 579 (1824)	19
United States v. Rickey, 457 F.2d 1027 (3rd Cir. 1972), cert. denied, 409 U.S. 863	38
United States v. Sanabria, 548 F.2d 1 (1st Cir. 1976)	22
United States v. Wilson, 534 F.2d 76 (6th Cir. 1976)	21, 24
Wade v. Hunter, 336 U.S. 684 (1949)	20

Statutes

U.S.C.A. Const. Amend 5	16

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on August 7, 1978.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit is not yet reported and is reprinted as Appendix A, infra. The Memorandum Opinion of the District Court, which is unreported as of the date hereof, is reprinted as Appendix B, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 7, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S. C. §1254(1). Abney v. United States, 431 U.S. 651 (1977).

QUESTION PRESENTED

Would the retrial of Quigley violate the Double Jeopardy Clause of the Fifth Amendment where the first trial ended in a mistrial due to prosecutorial overreaching?

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case concerns the denial by the United States District Court for the Western District of Pennsylvania, affirmed by Judgment Order of a panel of the United States Court of Appeals for the Third Circuit, of petitioner's motion to dismiss

indictment, which sought to bar a retrial of petitioner, on the ground that the retrial would contravene the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States since the first trial ended in a mistrial due to prosecutorial overreaching.

Earl W. Shord (hereinafter "Shord") and Roger W. Quigley, petitioner herein, were indicted for violation of 18 U.S.C. §§1951 and 1952 and conspiracy to violate the same, as well as violation of 29 U.S.C. §186(b).

Trial of this cause commenced in the United States District Court for the Western District of Pennsylvania on October 17, 1977 before the Honorable William W. Knox, sitting with a jury, and continued until October 20, 1977, at which time a mistrial was declared. (App. 5a, 6a) [1] Thereafter, petitioner filed a motion to dismiss indictment

1/ The designation "App." refers to the Consolidated Appendix, a copy of which has been certified and transmitted to this Court pursuant to Rule 21 of the Rules of the Supreme Court of the United States, and is followed by a numeral indicating page number(s) upon which references appear.

(App. 3a, 5a) in which Shord joined. (App. 6a)

On January 24, 1978, Judge Knox issued an Order denying the motions to dismiss indictments (App. 44a) and a Memorandum Opinion (App. 25a-43a)[2]. Petitioner and Shord filed appeals from that Order denying the motions to dismiss indictments which, pursuant to stipulation of counsel, were consolidated as permitted by Rule 3(b) of the Federal Rules of Appellate Procedure.

The gravamen of the charges against petitioner and Shord is that they conspired with one William Murray, Esquire (hereinafter "Murray") to unlawfully and wrongfully obtain the sum of $30,000.00 from Gerson Electric Company (hereinafter "Gerson") induced by the wrongful use of fear of financial and economic injury and loss to the business of

2/ The Memorandum Opinion of District Judge Knox appears as Appendix B" herein.

erson, and that said persons did, in fact, receive some or all of that sum of money. (App. 7a-24a)

Murray was granted immunity and testified on behalf of the Government relative to the allegations of the indictment. During the direct examination of Murray, Assistant United States Attorney Stephen I. Goldring attempted to elicit testimony from Murray relative to the method and amount of payments allegedly made by Gerson through Carter Electrical Construction Company (hereinafter "Carter") to Shord. (App. 235a-246a)

Murray testified that Chuck Udell, president of Carter, would give him cash to be paid to Shord and that he (Murray) kept a record of these payments on an envelope. (App. 236a) Thereupon, Murray identified Government Exhibit 18 as the white envelope on which he kept the record of payments. (App. 236a) As Murray explained, the

envelope (Government Exhibit 18) contains a written reference to the total amount of money paid to Shord as well as the date and amount of each payment. (App. 237a-238a) Murray further explained that, as each payment was made, he would deduct the amount from the total, leaving the balance on the envelope. (App. 240a) Government Exhibit 18 reflects that as of August 20, 1975, the date of the last entry on the envelope, there remained a balance owing to Shord of $4,500.00. (App. 240a)

After confirming that, as of August 20, 1975, a balance of $4,500.00 remained to be paid to Shord, Mr. Goldring asked the witness to state the reason for the balance. (App. 240a) At this point in the proceedings, counsel for Shord, Stanley Greenfield, Esquire, requested a side bar conference at which time he asked the Government for an offer of proof. (App. 240a) Mr. Goldring, responding to the request for an offer of proof, stated:

". . . I think my understanding of what the witness will testify to will be that it was at that time that Earl Shord was ultimately removed from the union office and was no longer in a position of power with respect to the union, and no longer would money have to go to him from Chuck Udell; and I think he would testify that Shord came to him as a result of his having been removed from office and inquired of him that, 'I guess this means I won't get the other $4500.'" (App. 240a-241a)

Mr. Greenfield conceded that the witness could properly testify about the conversation between Shord and Murray, but objected to any reference to the fact that Shord was removed from office on the ground that such testimony would raise an inference that others had made the judgment that there was wrongdoing. (App. 241a)

The court below ruled that anything that Shord said relative to the payments was admissible, but that the witness should refrain from testifying relative to Shord's removal from office. (App. 242a)

In this regard the court below stated;

"I think you should caution him not to give anything, a view in his mind as to why. But anything 'Earl said,' we will receive it.

"I agree with you. If this casts some doubt upon whether Mr. Shord had been investigated by the union, raises some questions as to that, it would be prejudicial. But if Mr. Shord says that, 'I have been removed from office, so I don't get any more money,' —" (App. 242a, 243a)

Mr. Goldring thereupon advised the court below that he did not know for certain what Murray's testimony would be and stated that he would ascertain that testimony during the lunch recess. (App. 243a-244a) At the conclusion of that recess, Mr. Goldring continued his direct examination of Murray relative to the notations on the envelope, Government Exhibit 18. (App. 243a-244a) Referring to the period of time during August, 1975, the date of the last payment to Shord, Mr. Goldring inquired as to any conversation Murray may have had

with Shord. (App. 244a)[3] After Murray indicated that he did not understand the question, Mr. Goldring asked the following question:

> "Let me rephrase it. Did you have any conversation with Earl Shord concerning his position with the union around this time period, August of '75?" (App. 244a)

Murray responded that he spoke to Shord at the time he was removed from office. (App. 244a) Mr. Goldring thereupon inquired as to the exact conversation relating to the amounts of money that

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[3] Mr. Goldring phrased this question as follows:

> "Now with respect to that time period, for the last payment, did you have any conversation immediately prior to that or immediately after that, rather, with Earl Shord, a telephone conversation?" (App. 244a)

were still due and owing to Shord. (App. 244a) In response to this inquiry, Murray attempted an unresponsive answer which made reference to Shord's removal from union office but was interrupted by Mr. Greenfield.[4] Thereupon, Mr. Goldring interrupted the statement of Mr. Greenfield's objection and the following testimony was elicited from Murray:

> "BY MR. GOLDRING:
>
> Q. What did Mr. Shord say to you?
>
> A. What did he say to me?
>
> Q. Yes.
>
> A. Well, I had met Earl after this had happened, and Earl told me that he had been removed from office.
>
> Q. And did he tell you why?

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[4] Murray's unresponsive answer was:

> "Earl -- I don't know what night it was. He was removed by Mike Namadam and Andy Johnson. I think Andy Johnson flew in from the West Coast somewhere and presented Earl with a statement signed by Chuck Udell, I believe, and I --" (App. 244a)

"A. No. He says he was threatened by the International executives.

Q. And did he tell you what they told him and what he said to them?

A. He says that Chuck Udell had presented a statement to -- The International presented the statement to Earl, and I think there was one or two other statements they presented to Earl to sign.

Q. Did he tell you he signed them?

A. Yes. He told me there was one he had signed and told me that it had contained something that he wouldn't run for office in Local Union number 5, that he wouldn't even attend meetings, for a period of I believe five years.

Q. When he spoke to you and informed you that he resigned, did he again say anything to you that you can recollect concerning his feelings -- well, strike that -- not his feelings, but what did he say, you know, with respect to this resignation?

A. At that same evening I met with Earl Shord, I think Roger Quigley, Bill Gimmell, Walter Burke. We all met over in Mt. Lebanon, and Earl was telling us what had happened. Earl was crying, and Earl said something to the effect, 'I guess this means that I won't get the remainder of my money.'" (App. 245a-246a)

After confirming with his witness that Shord actually made such a statement, Mr. Goldring followed with a leading question:

"Q. Did he say something to the effect, 'They finally got me on this one,' or anything of that --"

As Murray started to reply,[5/] Mr. Greenfield objected to the leading and prejudicial nature of the question and moved for a mistrial. (App. 246a) Counsel for petitioner joined in the motion. (App. 246a)

At side-bar, Mr. Goldring acknowledged that, prior to the lunch recess, he had been cautioned by the court below regarding this line of inquiry, and indicated that he had discussed the testimony with his immunized witness, Murray, to ascertain

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5/ Murray's aborted response was as follows:

"A. He says that, 'Finally --'" (App. 246a)

his responses. (App. 246a) Eventually, during the colloquy at side-bar, Mr. Goldring pleaded surprise and represented that Murray had informed him that Shord had said, "They finally got me on this one." (App. 247a) As Mr. Goldring explained:

> ". . . I tried on numerous occasions by my questioning to elicit the response that he indicated to me I would receive. I could not apparently get that response and I had to utilize what obviously was a leading question in order to ask it of him, and I think that in some cases leading questions are permissible." (App. 247a) 6/

During the discussions between counsel and the court below in chambers, Judge Knox commented that

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6/ Later, in chambers, Mr. Goldring explained that he had been suffering a certain amount of "frustration" with respect to the government's witnesses in that, in his discussions with them prior to their taking the witness stand, he was "not getting the responses that I anticipated". (App. 250a)

the testimony elicited from Murray could be construed by the jury as indicating that Shord had been removed from office by the international union in accordance with their duties and that such an inference would influence the jury in their consideration of this case. (App. 251a) In so finding, Judge Knox observed that the line of inquiry by Mr. Goldring and Murray's responses reveal that Shord's removal from office definitely resulted from the incidents which underlie the indictment. (App. 267a) The court below, seeing no alternative to the prejudicial questions and answers already of record before the jury, declared a mistrial. (App. 276a) 7/

7/ The court below briefly explored, as an alternative, severing the case relative to petitioner and proceeding with the trial as regards petitioner alone. (App. 275a-276a) The court below agreed that such a solution was not feasible in view of the prejudice that would attach to petitioner. (App. 276a)

REASONS FOR GRANTING THE WRIT

I.

The Retrial of Petitioner Would Violate the Double Jeopardy Clause of the Fifth Amendment Since the First Trial Ended In A Mistrial Caused By Prosecutorial Overreaching.

During the course of the trial in this case, Judge Knox found it necessary to grant the mistrial motion of Shord in which petitioner joined, because:

> ". . . the sum total of all this testimony as to Shord's removal for this very conduct by the International Executive Board of the International Union was so prejudicial that the damage done could not be repaired by cautionary instructions. . . ".

The Fifth Amendment[8/] to the United States Constitution prohibits placing of a defendant "twice in

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8/ The Fifth Amendment reads, in pertinent part, as follows:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S.C.A. Const. Amend. 5.

jeopardy" and represents a constitutional standard of finality for the defendant's benefit in criminal proceedings. United States v. Jorn, 400 U.S. 470, 479 (1970). As stated by Mr. Justice Stevens in Arizona v. Washington, ___U.S.___ , 98 S.Ct. 824, 829 (1978):

> ". . . the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal'. The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one and only one,

opportunity to require an accused to stand trial." Id., 98 S.Ct. 824 at 829. Accord, United States v. Martin, 561 F.2d 135, 138 (8th Cir. 1977) 9/

In the instant case, the mistrial was requested by counsel for Shord, with petitioner joining therein, after the Assistant United States Attorney persisted in his direct examination of the government's immunized witness by use of a highly prejudicial leading question, after being forewarned by the court that the particular line of inquiry must be

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9/ The Eighth Circuit, in United States v. Martin, supra, at 138, stated:

> ". . . the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)."

carefully circumscribed. In such cases, where a defendant moves for a mistrial, different considerations apply than in cases where a mistrial is declared sua sponte by the court. In the latter cases, since the defense has no control over the premature termination of the trial, the issue is whether there exists a "manifest necessity" for the mistrial. See, United States v. Dinitz, 424 U.S. 600, 606-608 (1976); United States v. Jorn, supra, at 480-81; United States v. Perez, 9 Wheat. 579, 580 (1824). In the former cases, where the mistrial was granted on defense motion, the bar to a retrial is generally removed. Lee v. United States, 432 U.S. 23 (1977).

However, in a limited set of circumstances, this Court, as well as other federal courts, has indicated that a mistrial requested by the defense bars reprosecution since the request for mistrial was necessitated by prosecutorial overreaching. See, United States v. Dinitz, supra, at 611; United

States v. Jorn, supra, at 486. This Court, in Dinitz, recognized that a defendant, in moving for a mistrial, generally

> " . . . faces a 'Hobson's Choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." Id. at 609

However, the facts of Dinitz disclose that the mistrial was not granted because of prosecutorial overreaching, but rather because defendant's selected trial counsel was expelled from the courtroom due to his own misconduct and defendant's co-counsel was forced to request the mistrial because he was not prepared to try the case. Similarly, none of the cases decided by this Court has reached the issue of prosecutorial overreaching, although many of the cases contain pertinent dicta. See, e.g., Lee v. United States, supra; United States v. Dinitz, supra; Illinois v. Somerville, 410 U.S. 458, 461 (1973); United States v. Jorn, supra; Downum v. United States, 372 U.S. 734 (1963); Gori v. United States, 367 U.S. 364 (1961); Wade v. Hunter, 336 U.S. 684 (1949).

Recently three circuits have faced the issue of prosecutorial overreaching and, in each instance, the courts unequivocally upheld the doctrine barring retrial where the record disclosed either intentional misconduct or gross negligence on the part of the prosecutor. United States v. Martin, supra; United States v. Wilson, 534 F.2d 76 (6th Cir. 1976); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).[10/] In United States v. Kessler, supra, the

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10/ Prior to the instant case, the Third Circuit had not had occasion to decide this issue. See, United States v. Cerilli, 558 F.2d 697 (3rd Cir. 1977); United States v. DiSilvio, 520 F.2d 247 (3rd Cir. 1975). In Cerilli, the trial judge had given defense counsel a choice of proceeding with eleven jurors after one juror became ill during deliberations or moving for a mistrial. Defendants opted for a mistrial. There was no issue in the case relative to the prosecutor's having contributed to the mistrial. However, in its decision, this Court upholds the principle that prosecutorial overreaching will serve as a bar to retrial:

> "Where a mistrial is predicated on prosecutorial bad faith or overreaching, as noted in Lee, a reprosecution, of course, may be prohibited. Here, however, there are no allegations or suggestions that the declaration of a mistrial rested upon prosecutorial misconduct. Rather, it is

the Fifth Circuit upheld the dismissal of the indictment, after the first trial had ended in a mistrial, where the defense motion for mistrial had been granted because the government elicited inadmissible hearsay declarations and had introduced an improper exhibit into evidence. The trial judge had originally overruled the defendants' objections to the testimony and physical evidence

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10/ (continued)

> manifest that the basis for the mistrial was the illness of a juror, a factor outside the control of the parties to the proceeding." Id., at 701 (Emphasis supplied)

Likewise, other circuits, while not having to reach the issue directly, have approved the doctrine that retrial is barred if a mistrial was caused by the prosecutor. See, e.g., United States v. Grasso, 552 F.2d 46, 52 (2nd Cir. 1977); United States v. Sanabria, 548 F.2d 1, 8 (1st Cir. 1976).

on the basis of representations by the prosecutor that a nexus would be developed between the challenged evidence and the alleged conspiracy. As it later developed, the proposed nexus did not exist. Chief Judge Markey, writing on behalf of the unanimous panel, after reviewing the historical development of the Double Jeopardy Clause, stated the applicable legal principles:

> "But the Supreme Court recognizes that there may be exceptions to that rule -- rare cases involving circumstances which are 'attributable to prosecutorial **** overreaching,' Jorn, supra, 400 U.S. at 485, 91 S.Ct. at 557, 27 L.Ed.2d at 556. Where 'prosecutorial overreaching' exists, a defendant's mistrial request does not remove the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.
>
> "Where 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. This safeguard against 'prosecutorial overreaching' provided defendants by the Fifth Amendment's Double Jeopardy Clause complements the 'inestimable safeguard

against the * * * overzealous prosecutor' provided by a jury trial.

"Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was 'prosecutorial overreaching' is our inquiry. If 'prosecutorial overreaching is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.

"To find 'prosecutorial overreaching' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice(d) a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' United States v. Dinitz, supra, ___ U.S. at ___, 96 S.Ct. at 1080, 47 L.Ed.2d at 274, 44 U.S.L.W. at 4312." Id., at 1255, 1256. 11/

11/ In United States v. Wilson, supra, the Sixth Circuit affirmed the basic concepts followed by the Fifth Circuit in Kessler relative to prosecutorial overreaching, but remanded the case to the district court because the scant record in that case was deemed to be insufficient to enable an adequate review of the prosecutorial misconduct issue. United States v. Wilson, supra, at 80-82. Unlike Wilson, the issue in the instant case does not require the development of the record beyond the trial proceedings since Judge Knox's side-bar admonitions to the Assistant United States Attorney and the fatal line of interrogation are quite clearly set forth. (App. 240a-275a)

In United States v. Martin, supra, the Eighth Circuit reversed the conviction of a defendant at his second trial on the ground that the Double Jeopardy Clause barred the retrial. In so doing, the Eighth Circuit held that the reading of certain excerpts from the grand jury proceedings, containing irrelevant and prejudicial material, constituted gross negligence on the part of the prosecutor and, therefore, barred defendant's retrial. The Eighth Circuit opinion specifically refrains from making a specific finding that the actions of the prosecutor were intentionally designed to provoke a mistrial, but did find that:

"If the government's actions in reading this irrelevant and highly prejudicial testimony to the jury were not intentionally designed to provoke a mistrial request, at a minimum they constituted gross negligence. It can best be described as prosecutorial error undertaken to harass or prejudice the defendant -- prosecutorial overreaching." Id., at 141.

In addition to the decisions of the Fifth and Eighth Circuits, the United States District Court for the Southern District of Florida decided the precise issue now before this Court, on substantially similar facts, and likewise upheld the doctrine barring retrial. United States v. Broderick, 425 F. Supp. 93 (S.D. Fla. 1977)

In Broderick, supra, Judge King granted defendant's motion to dismiss the indictment on double jeopardy grounds when the prosecutor, contrary to the court's instructions, elicited a hearsay statement before the jury. Judge King, in his opinion, held as follows:

> "The court finds that the 'prosecutorial overreaching' defined in Kessler, occurred in this case. Clearly, the hearsay statement which the prosecutor elicited despite her agreement not to do so, caused aggravated circumstances to develop which 'seriously prejudiced the defendant causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' Id. The statement identified the defendant's truck as the vehicle

> waiting for the Hatians at the airport and indicated the defendant was expecting a planeload of illegal aliens. The statement directly contradicted the defense that the defendant did not know that the people he was giving a ride to were illegal aliens, and that he was there only to pick up farm machinery parts in his truck.
>
> "The last element in the Kessler test, that gross negligence or intentional misconduct by the government must trigger the mistrial, is also present in this case. The prosecutor's conduct involved both intentional misconduct and gross negligence. She deliberately elicited the statement, even though she had been twice cautioned not to do so because of its prejudicial and hearsay nature. Furthermore, she had agreed not to elicit it and the trial judge ratified this agreement. Thus the prosecutor triggered the mistrial through intentional misconduct. The prosecutor says that through over night research, she became convinced that the statement was admissible in evidence. If this is true, the problem could have been entirely avoided by arguing her position again and obtaining a ruling from the court. She chose instead to deliberately ask the witness the prohibited question in the presence of the jury. In so doing the prosecutor invited the mistrial." Id., at 96, 97.

As indicated by Kessler, Martin and Broderick, any analysis of the issue presented in the

instant case must begin by examining the total facts and circumstances leading to the declaration of a mistrial. In Kessler and Broderick, the prosecutor elicited hearsay statements, while in Martin the prosecutor read to the jury extraneous and prejudicial excerpts from the grand jury proceedings. In none of those cases did the trial or appellate courts make a specific finding that the prosecutor acted intentionally in order to cause a mistrial or gain any advantage. However, the courts, either explicitly or implicitly, found the prosecutor's conduct to be grossly negligent and sufficiently prejudicial to taint the proceedings and cause the premature termination of the trial. Like those three cases, this case resulted in a mistrial when the prosecutor attempted to bolster his case by introducing extraneous and prejudicial evidence before the jury.

In the instant case, which, on its facts, is closest to Broderick, the government embarked upon a line of interrogation of its immunized

witness that had been clearly circumscribed by the trial judge. (App. 242a-243a) Thus, like the circumstances in Broderick, the prosecutor knew from the inception of his direct examination relative to the particular point in question that he was treading on dangerous ground. Moreover, in the instant case, the trial judge requested that the prosecutor specifically caution the witness relative to the court's ruling on what testimony was permissible and that certain testimony was prohibited. (App. 242a-243a) According to Mr. Goldring, he did discuss these matters with the witness. (App. 246a) However, as Mr. Goldring admits (App. 254a) and as the record indicates, this is not the case where the witness blurted out the prohibited testimony. (App.244a-246a) In fact, the motion for a mistrial came only after Mr. Goldring, who was obviously not satisfied with the witness' initial response to his question relative to what Shord said to Murray, interjected a highly prejudicial statement into the case, in the form of

a leading question, in defiance of the prior ruling of the trial court. (App. 246a) In his Memorandum Opinion, Judge Knox found that:

> "The leading question and the answer which commenced indicated that Shord had been guilty of similar conduct on other occasions." (App. 28a)

The record indicates a persistent attempt by the prosecutor to obtain the exact answer from Murray that the prosecutor anticipated he would receive after his lunchtime discussions with Murray. (App.246a-247a) It was proper, under the court's ruling, to attempt to elicit what Shord said to Murray and Mr. Goldring made repeated attempts to do so. (App. 242a-243a) It was improper, under the court's ruling, to raise any inference before the jury to the effect that there had been a prior adjudication of the matters before it by the International Union or any other body. (App. 242a-243a) Yet, despite the fact that the witness testified as to what Shord said to him regarding payment of the remainder of the money (App. 246a) Mr. Goldring

refused to let the matter rest with the answer given. Instead, Mr. Goldring, on direct examination, asked the witness a highly prejudicial and leading question which suggested a prior adjudication of guilt against defendant Shord. (App.246a) Thus, in effect, Mr. Goldring, under the guise of a question pertaining to Shord's conversation with Murray, a question already asked and answered, put before the jury the idea that Shord had previously been adjudicated "guilty". (App. 246a)

If Mr. Goldring had not previously been made aware of this problem area by objection of defense counsel and a specific ruling by the trial judge on the proposed testimony, it is doubtful that Judge Knox would have deemed it necessary to take the drastic action of granting the mistrial. In this respect, the case is much like that presented in Broderick, where the prosecutor was warned not to elicit certain hearsay testimony but unilaterally decided that the evidence was admissible even after

the court ruled it was not. The court made particular note of the fact that the prosecutor, in the exercise of due caution, should have requested a bench conference prior to proceeding down a path previously delineated as dangerous. United States v. Broderick, supra, at 95. Likewise, Mr. Goldring, not getting the anticipated response from his witness, should have either let the matter rest or, at least, requested a bench conference. His failure to do so cannot be excused by the fact that he had experienced frustration with respect to his witnesses in not obtaining anticipated responses to his questions. Id. at n. 6 (App, 250a) It is axiomatic that a lawyer, let alone one charged with the grave responsibility of a prosecutor, is not entitled to any particular response to his questions. In this case, such persistence, in the face of the court's ruling and with a witness with whom the prosecutor had been experiencing frustration, can only be deemed gross negligence. This is particularly true where the proper question had been asked and answered and the

persistence took the form of a highly prejudicial and isleading question. Under these circumstances, petitioner as well as Shord, who were deprived of their right to a fair trial and an adjudication by the first jury, may not be subjected to a retrial. United States v. Martin, supra; United States v. Kessler, supra; United States v. Broderick, supra.

Despite the compelling reasons in favor of barring the retrial of petitioner and Shord under the circumstances of this case, as well as the strong language in Kessler, Martin and Broderick relative to the prosecutor's responsibility for conducting his case within reasonable limits, Judge Knox refused to recognize prosecutorial overreaching as a basis for barring retrial unless there was evidence that the prosecutor deliberately provoked the motion for mistrial to gain some advantage for the government. (App. 32a) In this case, despite a finding that the prejudice to the defense was irreparable and that the mistrial was a necessity, Judge Knox, in denying the motions to dismiss indictment,

characterizes the actions of the prosecutor as "inadvertence coupled perhaps with some confusion..". (App. 32a)

However, the decided cases relative to prosecutorial misconduct as a basis for barring retrial[12/] rest on the theory that, because of the prosecutor's conduct, the accused, through no fault of the defense, was compelled to give up his "valued right" to have his case concluded in a single proceeding in order to avoid possible juror bias. The principles of those cases, indeed the Double Jeopardy Clause of the Fifth Amendment, do not contemplate a judgment regarding the state of mind of the prosecutor. If the conduct of the prosecutor, whether through intentional bad faith or by negligence, overzealousness, confusion or even inadvertence, is sufficiently detrimental to a fair

12/ United States v. Martin, 561 F.2d 135, 138 (8th Cir.); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976); United States v. Broderick, 425 F.Supp. 93 (S.D.Fla. 1977).

trial to cause the trial judge to exercise his discretion to terminate the proceedings prior to verdict, it is manifestly unfair to subject to accused to a second prosecution. To do so increases his "financial and emotional burden", prolongs the period during which he is stigmatized by the unresolved accusations of wrongdoing, and enhances the risk that, even if innocent, he may be convicted. For these reasons, this Court has clearly stated the "general rule" that the prosecutor is "entitled to one and only one" opportunity to subject an accused to trial. See Arizona v. Washington, supra, 98 S.Ct. at 830 (1978); Abney v. United States, 431 U.S. 651 (1977)

II.

PETITIONER'S RETRIAL IS BARRED SINCE HE HAD NO CHOICE BUT TO JOIN IN HIS CO-DEFENDANT'S REQUEST FOR MISTRIAL IN ORDER TO PRESERVE THE UNDERLYING ISSUE FOR APPELLATE REVIEW IN THE EVENT THE MISTRIAL MOTION WAS DENIED.

The facts of this case and the circumstances surrounding the grant of a mistrial at the defendants' request present a question of first impression to be decided under the Double Jeopardy Clause of the Fifth Amendment. Two defendants were on trial in the instant case charged, inter alia, with conspiracy. During the course of the trial the prosecutor, despite having been forewarned by the trial judge that a certain line of direct examination of its immunized witness must be carefully circumscribed, propounded a series of questions and elicited part of an answer that clearly indicated to the jury that petitioner's co-defendant, Shord, had been previously adjudicated guilty of charges similar to those for which he was now on trial. (App. 246a; 251a) Shord's trial

counsel immediately moved for a mistrial, in which petitioner joined. (App. 246a-247a)

This Court has indicated that, where a mistrial is requested by a defendant and thereafter granted, the bar to retrial is generally removed in the absence of prosecutorial bad faith or intentional misconduct. See, e.g., Lee v. United States, supra; United States v. Dinitz, supra. Judge Knox, in the instant case, relied on Lee in ruling that there was no bar to the retrial of Shord and petitioner.

However, Shord and petitioner do not stand in the same position relative to this Double Jeopardy issue. It may well be that Shord waived his rights relative to the Double Jeopardy Clause on the theory that he voluntarily chose to terminate the first trial because of prejudice to his case. Nevertheless, petitioner was not exercising a free choice when he joined in the motion for mistrial. On the

contrary, petitioner had no choice at all. His failure to join in Shord's motion would have waived the underlying issue in the event the motion for mistrial was denied. See e.g. United States v. Rickey, 457 F.2d 1027 (3rd Cir. 1972), cert. denied, 409 U.S. 863; United States v. Archie, 452 F.2d 897 (3rd Cir. 1971), cert. denied, 405 U.S. 1071. Thus, in this case, petitioner, whose trial was interrupted by prosecutorial error as well as the co-defendant's successful motion for mistrial, was literally forced to give up his "valued right to have the trial completed by a particular tribunal" by circumstances beyond his control. For this Court to require petitioner to undergo a second trial in these circumstances ignores the reasons why this "valued right" merits constitutional protection:

> "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs

> the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one and only one, opportunity to require an accused to stand trial." Arizona v. Washington, supra, 98 S.Ct. at 89, 830.

III.

THE DECISION OF THE COURT BELOW IS, SUB SILENTIO, IN CONFLICT WITH DECISIONS OF THE EIGHTH AND FIFTH CIRCUITS RELATIVE TO THE STANDARDS TO BE APPLIED UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

In the district court's Memorandum Opinion denying defendants' motions to dismiss indictments, filed by District Judge Knox in the instant case, it is apparent that that court would grant relief pursuant to the Double Jeopardy Clause of the Fifth Amendment only upon a showing that the prosecutor, in causing the mistrial, acted in bad faith or that his conduct was willful and intentional. (App. 32a, 33a)

The Third Circuit, by its judgment order (Appendix "A") affirmed the judgment of the district court and, sub silentio, appears to have adopted its standard relative to the Double Jeopardy Clause as it relates to cases of prosecutorial misconduct or overreaching. In so doing, the court below has put itself in direct conflict with the Eighth and Fifth Circuits relative to that issue. United States v. Martin, supra; United States v. Kessler, supra. In each of those cases, it is apparent that retrial of a defendant may be barred by prosecutorial overreaching. Since neither of those cases involved a finding of intentional misconduct, it is clear that mere gross negligence is sufficient to bar a second trial.

The result below is thus different than that which would obtain in the Eighth and Fifth Circuits since these latter circuits do not require a finding of "intentional misconduct" Had petitioner been indicted in either of those circuits, he would not be faced with a second trial under the circumstances

presented herein since it is clear that the prosecutor in this case was grossly negligent in his persistent attempt to bolster his case by repeated attempts to pursue a line of inquiry about which he had been forewarned by the court. In order to eliminate such anomalous results, a writ of certiorari should be granted in order to resolve the conflict.

CONCLUSION

Based on the foregoing arguments and the totality of circumstances of this case, Shord and Quigley are constitutionally entitled to a dismissal of the indictment under the Double Jeopardy Clause of the Fifth Amendment. U.S.C.A. Const. Amend. 5. Petitioner prays that this case be remanded to the

district court with instructions that the indictment be dismissed.

Respectfully submitted,

RICHARD H. MARTIN

BASKIN, BOREMAN, WILNER,
SACHS & GONDELMAN

Attorneys for Petitioner,
Roger W. Quigley

APPENDIX A - Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1200
78-1201

UNITED STATES OF AMERICA

vs. Appellant in No. 78-1200

SHORD, EARL W.,

(D.C. Crim. No. 77-138-1)

UNITED STATES OF AMERICA

vs. Appellant in No. 78-1201

QUIGLEY, ROGER W.,

(D.C. Crim. No. 77-138-2)

Appeal from the United States District Court
for the Western District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
August 7, 1978

Before: ALDISERT, VAN DUSEN and HUNTER, Circuit Judges.

Appendix A - Judgment Order

JUDGMENT ORDER

After considering the contention raised by appellants, to-wit, that the district court erred in ruling that the retrial of appellants would not violate the Double Jeopardy Clause of the Fifth Amendment where the first trial ended in a mistrial caused by prosecutorial overreaching; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert
Circuit Judge

Attest:

M. Elizabeth Ferguson
Acting Clerk

DATED: August 7, 1978

Appendix B - Memorandum Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 77-138
EARL W. SHORD and	)	
ROGER W. QUIGLEY	)	

Dated: January 24, 1978

MEMORANDUM OPINION
DENYING DEFENDANTS' MOTIONS TO DISMISS INDICTMENT

In recent years the court has noted an increasing tendency among defense counsel in criminal cases to move for mistrial on numerous occasions during a trial claiming introduction of prejudicial evidence or prejudicial conduct on the part of the government and if per chance such a motion is granted then move to dismiss the indictment because defendant has been once in jeopardy. There is now before the court another situation of this type.

The defendants Earl W. Shord and Roger W. Quigley were union officials, Shord being business

manager of Local Union 5, International Brotherhood of Electrical Workers a labor organization and Roger W. Quigley being its business agent. The indictments charged violations of 18 USC 1951 and 1952 and 29 USC 186(b) it being alleged that during the course of construction of a large office building in Pittsburgh, Pennsylvania, vis: the Equibank Building these defendants had demanded and received from contractors various sums of money through fear of economic and financial injury resulting from labor difficulties at the project in question. In the case there was an un-indicted co-conspirator, William Murray, attorney for the Union who had been granted immunity by the government.

During the trial after many facts relative to the payment of monies to the defendants had been developed Murray was called to the stand by the government and testified relative to the negotiations between the defendants and the contractors which resulted in an agreement whereby certain monies were to be paid to Murray and thereafter some monies were disbursed

to Quigley and others were to be disbursed in installments to Shord by Murray. The payments to Shord were never completed and at this point in the trial difficulty occurred because Shord indicated to Murray that he did not expect any more payments because he was no longer a union official. Murray explained over objection and after caution by the court that Shord was no longer a union official because he had been removed from office by the international union as the result of the conduct in question which was the subject of the indictment.

The court ruled that it was not proper for the government to introduce evidence in chief to show that Shord had been removed by the International Union Executive Board as a result of the very conduct which was the subject of the indictment since this would indicate to the jury that an impartial body had already passed judgment upon Shord's conduct as the result of which he was removed from office. The case is similar to a

situation where the government during the trial of an attorney for a criminal offense attempts to introduce evidence that the attorney had already been disbarred for this same conduct by the Supreme Court of the State which the court considered to be highly prejudicial. The court did however rule that anything that Shord said to Murray relative to the fact that he did not expect further payments was admissible as corroborative of the fact that he had received previous payments for the same purpose. The portions of the transcript which deal with the problem before the court are attached to this memorandum opinion and marked Appendix A.

When the matter first arose the defendants objected to the proposed testimony and the court at sidebar cautioned the government not to introduce testimony relative to Shord's removal from office by the international union but that anything which Shord said to Quigley would be admitted. The court recessed for lunch at this point to give the government's

attorney a chance to caution the witness who was an attorney. After lunch, Murray's testimony resumed and finally after the witness testified that Shord had told him he had been removed from office but not why government counsel asked a leading question "Did he say something to the effect that 'They finally got me on this one.' or anything of that...?" Answer: He says that "Finally . . ." At that point motions for mistrial were made by both defendants. As a matter of fact, the witness had already interjected not as an admission from the defendant but as a statement of his own that Shord had been removed from office. Exactly why was not clear. The leading question and the answer which commenced indicated that Shord had been guilty of similar conduct on other occasions.

The court ruled that the sum total of all this testimony as to Shord's removal for this very conduct by the International Executive Board of the International Union was so prejudicial that the damage done could not be repaired by cautionary

instructions and therefore a mistrial was declared. The case was placed upon the trial list for trial at a subsequent session of jury trials and at this juncture both defendants moved to dismiss the indictment because the defendants had been once in jeopardy.

It will be noted that in this case both defendants moved for a mistrial because of the introduction of prejudicial evidence and therefore we are not confronted with the question which arises where the trial judge aborts a trial on his own motion because of what he perceives as prejudice without motion by the defendant and the once in jeopardy problems which result from this. This was the situation in US v. Jorn, 400 US 470, 27 L Ed 2d 543, 91 S Ct 547 (1971). Rather, this case is of the other variety as dealt with in US v. Dinitz, 424 US 600 (1976), where a mistrial was declared on motion by the defendant after one of defendant's counsel had been expelled from the trial for misconduct. The court there dealt with this situation as follows:

> "Different considerations obtain, however, when the mistrial has been declared at the defendant's request. The reasons for the distinction were discussed in the plurality opinion in the Jorn case:
>
> 'If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by a judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

The court further said with respect to the problem when circumstances of this kind face defense counsel as well as trial judges as follows:

> "Yet the Court of Appeals' decision, in effect, instructs trial judges to reject the most meritorious mistrial motion in the absence of manifest necessity and to require, instead, that the trial proceed to its conclusion despite a legitimate claim of seriously prejudicial error. For if a trial judge follows that course, the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is set aside by the trial judge or reversed on appeal. US v. Ball, 163 US 662, 41 L Ed 300, 16 S Ct 1192.

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' US v. Jorn, supra, at 485, 27 L Ed 2d 543, 91 S Ct 547 threatens the 'harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."

The court determined in Dinitz that the expulsion of defense counsel from the proceedings was not in bad faith for the purpose of goading the defendant into requesting a mistrial or to prejudice his prospects for acquittal and therefore it was held that there was no violation of the Constitutional right not to be twice put in jeopardy.

Again, more recently in Lee v US, US , 53 L Ed 2d 80 (6/13/77) the court again reviewed the once in jeopardy problems. This case again involved the granting of defense motion to dismiss the information because of failure to charge knowledge or intent. The court there indicated that a mistrial ruling invariably rests on grounds consistent with

reprosecution. The court held that dismissal in mid-trial because of failure of the indictment to charge an offense was indistinguishable from a declaration of mistrial and that in a situation such as this a retrial was permissible.

Lee again makes it clear that the basic question is whether there has been prosecutorial or judicial overreaching and that there is no bar to a retrial if it is merely a cause of prosecutorial or judicial error, that it is only where the underlying error is motivated by bad faith or to harass a defendant or deliberately to prejudice him and the government actions were intended to provoke a mistrial request that the once in jeopardy defense takes hold. More recently in US v. Cerilli, 558 F 2d 697 (3d Cir 1977) the court described the lee case as encapsulating double jeopardy precepts as follows:

> "The Supreme Court's recent opinion in Lee v. US, while not squarely on point, cogently encapsulates double jeopardy precepts which bear on the present inquiry. In Lee, decided by an 8-1 majority, the court reiterated the fundamental rule that 'where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial,

> the Double Jeopardy Clause generally will not stand in the way of reprosecution. Only if the underlying error was 'motivated by bad faith or under taken to harass or prejudice' will there be any barrier to retrial . . ." Put another way, double jeopardy poses no obstacle to a subsequent reprosecution where the prior 'proceedings were terminated at the defendant's request and with his consent'."

Other recent cases summing up the law on this situation are US v. Weaver, 565 F 2d 129 (1977) where the court said at page 133:

> "As we stated in US v. Martin, 561 F 2d 135 (8th cir 1977), the deouble jeopardy clause generally would not stand in the way or reprosecution where the defendant has requested a mistrial. Only in limited circumstances, where the judicial or prosecutorial error that prompts the defendant's motion is intended to provoke the motion or is otherwise motivated by bad faith or undertaken to harass or prejudice the defendant, does the double jeopardy clause bar retrial. Lee v. US, 97 S Ct 2141, 53 L Ed 2d 80 (1977). Assuming arguendo the district court's action could be characterized as error, we find that it is not the product of the kind of overreaching which would bar the defendant's retrial. It follows that Weaver's retrial did not violate his rights under the double jeopardy clause of the Fifth Amendment."

Applying these principles to the case at bar it is apparent that the government here has not been guilty of prosecutorial overreaching or bad faith or the purpose of deliberately prejudicing the defendants or provoking them into making a motion for mistrial so that the government could try again another day to convict them in a case that was going badly. As a matter of fact, the evidence already produced by the government showed a course of conduct which would have justified a conviction.

Rather, the court appraises the situation which resulted here as a case of inadvertence by the prosecutor coupled perhaps with some confusion as to exactly what the court's ruling prior to lunch had indicated as permissible and the resulting conference between government's counsel and the witness, an attorney, had left him in doubt as to how far he could go. For this reason he was hesitant to respond to the government's questions and this in turn led to the leading questions which should not have been asked and which brought out the very thing which the

court had ruled was improper except as admissions and statements from the defendant, to wit: a showing that the international union had removed this official for this very conduct which was being considered by the court and jury in this case. We are not concerned here as the government points whether the court's action in declaring a mistrial because of the introduction of this prejudicial matter was correct or not. We are only ruling that since both defendants asked for mistrials in this case and there was no evidence of wilfull intentional conduct of the kind characterized in Lee as barring a retrial on grounds of once in jeopardy that the defense motions to dismiss for once in jeopardy must be denied.

An appropriate order will be entered.

/s/ William W. Knox
U.S. District Judge

cc: Counsel of record.

Murray - Direct

from the total, leaving a balance; and then there were a total of six payments, one on May 6th, $200; May 23rd, $500; June 16, a thousand; July 10, a thousand; and August 20, a thousand, which would total that Earl had received -- No. Excuse me. The balance would then be $4,500.

Q. Now the Government Exhibit number 18, the envelope that you have just testified from, reflects that August 20, 1975, was the date of the last payment given to Earl Shord; is that correct?

A. That's correct.

Q. Why was that?

MR. GREENFIELD: Well, may we approach the bench now?

(At side bar, out of the hearing of the jury/)

MR. GREENFIELD: I would like an offer as to what is the relevance of that question.

APPENDIX "A"

THE COURT: What was the question again?

MR. GREENFIELD: Why was it that the payments were stopped?

THE COURT: Oh.

MR. GOLDRING: Okay. I think my understanding of what the witness will testify to will be that it was at that time that Earl Shord was ultimately re moved from the union office and was no longer in a position of power with respect to the union, and no longer would money have to go to him from Chuck Udell; and I think that he would testify that Shord came to him as a result of his having been removed from office and inquired of him that, "I guess this means I won't get the other $4,500."

MR. GREENFIELD: s I understand it -- Well, that's obviously highly prejudicial that he was -- Of course, he can testify about the conversation. I can't resist that, but the reference to the fact that he was removed from office is highly prejudicial. That implies that others made the judgment that there was wrongdoing in this matter, and that's for this jury to decide.

Moreover, as I understand the Government's theory of the case, the money was due and owing and payable, period, and they just didn't pay. It was due -- ten thousand was due the day that it was due, and it wouldn't matter thereafter what happened; and therefore, if they didn't pay it thereafter, it is not because of anything Earl was to do or not to do. They chose to unilaterally stop at that point.

THE COURT: Well, anything that Earl Shord said is competent.

MR. GREENFIELD: Sure. I said that. I said I was conceding that anything he said must go on. I have no way to resist that.

THE COURT: Even though it is prejudicial.

MR. GREENFIELD: Well, even some things -- if he said he had just committed a rape, he wouldn't let that in.

THE COURT: lot of things are prejudicial.

Well, yes. Maybe if he said, "I don't want any more money, I have been arrested for rape," that might be --

MR. GREENFIELD: But in any event, with respect to his resignation, he didn't say that they knew that, and that was -- that's irrelevant.

THE COURT: Well, what he knows I don't think we will admit, but anything that Earl Shord said, if he said, "Now that I have been removed from office, I'm not going to get the $4,500", I will rule that's competent.

MR. GOLDRING: All right. In order to -- Out of an abundance of caution, with respect to this matter -- and I don't want to introduce any error -- I'm not certain of the fashion that the witness would testify to that. I may just ask, since this is apparently the time that we have adjourned for lunch in the past. If we are going to do that, that may be all the questions I have of this witness.

THE COURT: I think you should caution him not to give anything, a view in his mind as to why. But anything "Earl said," we will receive it.

I agree with you. If this casts some doubt upon whether Mr. Shord had been investigated by the union, raises some question as to that, it would be prejudicial.

But if Mr. Shord says that, "I have been removed from office, so I don't get any more money, --

MR. GOLDRING: The point is, I don't know for certain what the witness will say. Out of an abundance of caution, I would ask that we take our lunch recess now, I will make that determination now, and we conclude immediately after.

THE COURT: I think he should be cautioned.

All right, let's recess until 1:45 for lunch.

(In open court.)

THE COURT: Members of the jury, we will go to lunch now, recess until 1:45.

(Court recessed at 12:20 p.m.)

- - - - - -

Proceedings resumed before the jury at 1:50 p.m.

Defendants were present with counsel.)

(Mr. Murray resumed the witness stand.)

BY MR. GOLDING:

Q. Mr. Murray, I just have a few more questions. Prior to recessing for lunch, you had indicated that according to Government Exhibit 18,

the envelope that you had testified from, the last payment was made on August 20, 1975; is that correct?

A. That's correct.

Q. Now with respect to all these payments and the dates indicated on the envelope, would this date reflect the date that the money was received by you from Chuck Udell?

A. In all probability, it would indicate both the date received by me and also paid to Earl Shord. The same day I got it I gave it to Earl.

Q. Now with respect to that time period, for the last payment, did you have any converstion immediately prior to that or immediately after that, rather, with Earl Shord, a telephone conversation?

(No answer.)

Q. All right, —

A. I'm sorry. I don't understand the question.

Q. Let me rephrase it. Did you have any conversation with Earl Shord concerning his position with the union around this time period, August of '75?

A. Well, at the time that he was removed by the International, I had spoken to him.

Q. All right. Now what exactly did he say to you, you know, concerning this matter and concerning th amounts of money that were still due and owing to him?

A. Earl -- I don't know what night it was. He was removed by Mike Namadam and Andy Johnson. I think Andy Johnson flew in from the West Coast somewhere and presented Earl with a statement signed by Chuck Udell, I believe, and I —

MR. GREENFIELD: If the Court please, the question, I take it, was what --

BY MR. GOLDRING:

Q. What did Mr. Shord say to you?

A. What did he say to me?

Q. Yes.

A. Well, I had met Earl after this had happened, and Earl told me that he had been removed from office.

Q. And did he tell you why?

A. No. He says he was threatened by the International executives.

Q. And did he tell you what they told to him and what he said to them?

A. He says that Chuck Udell had presented a statement to -- The International presented the statement to Earl, an I think there was one or two other statements they presented to Earl to sign.

Q. Did he tell you he signed them?

A. Yes. He told me there was one he had signed and told me that it had contained something that he wouldn't run for office in Local Union number 5, that he wouldn't even attend meetings for a period of I believe five years.

Q. When he spoke to you and informed you that he resigned, did he again say anthing to you that you can recollect concerning his feelings -- well, strike that -- not his feelings, but what did he say, you know, with respect to this resignation?

A. At that same evening I met with Earl Shord, I think Roger Quigley, Bill Gimmell, Walter Burke. We all met over in Mt. Lebanon, and Earl was telling us what had happened. Earl was crying, and Earl said something to the effect, "I guess this means that I won't get the remainder of my money."

A. He said to you?

A. Yes, he did.

Q. Did he say something to the effect, "They finally got me on this one," or anything of that --

A He says that, "Finally --

R. GREENFIELD: If the Court, please, I object. That's leading, prejudicial, and I move for a mistrial.

MR. GOLDRING: I think --

THE COURT: All right, come to side bar.

(At side bar, out of the hearing of the jury.)

MR. MARTIN: I would join in the motion, Your Honor.

THE COURT: Mr. Goldring, I cautioned you about this before lunch.

MR. GOLDRING: Your Honor, I would state that the witness informed me completely, and we had

discussed this, that he said that's exactly the words that were told to him, and that's what I have been trying to elicit from him.

I don't want to get up and say that I now would have to plead surprise as to his testimony or anything of that nature, but I thing, Your Honor, that I went over this very carefully with him and am certain, as certain as I could be, that that is his testimony and he will testify to that.

I don't know why -- You know, I don't know --

THE COURT: I understand he was just to answer a question of what if anything Earl Shord said about these being the last of his payments.

I want to be sure about just what he said. I wish you would read back.

(Questions and answers read as contained at page 372 line 17 to page 375 line 7)

MR. MARTIN: Did you have my motion for a mistrial?

THE REPORTER: Yes.

MR. GOLDRING: With respect to that statement, Your Honor, I would -- The only way around some of this maybe is for me to plead surprise on the part of my witness, because we had discussed this very carefully what his testimony would be. I am virtually certain that his testimony will be as I can now represent it, that that's what he said Earl Shord said, that, "They finally got me on this one."

That was -- I tried on numerous occasions by my questioning to elicit the response that he indicated to me I would receive. I could not apparently get that response, and I had to utilize what obviously was a leading question in order to ask it of him, and I think that in some cases leading questions are permissible.

I also think, Your Honor, that in effect his testimony up to that point in time concerning his resignation and what Shord told to him had the same effect as the question that I was intending to ask him at that point.

I also think if the Court does not permit me to ask the question that I would, of course,

withdraw and ask the Court to give the jury a cautionary instruction. I don't think it is a question of the nature that would require a mistrial.

THE COURT: All right. Now we are faced with a motion for mistrial.

Now I want to review it very carefully, because it would show that he was removed for some other cause. It might not be too important, such as he violated some other rules and regulations on what he was supposed to do or something of that nature, or he called a strike that he shouldn't have. But this thing is tied right down to this particular thing, and he signed a statement, and "They got me on this one," and the whole thing is that it would lead the jury to believe that he has already been judged by his International on this thing for taking money from an employer.

MR. GOLDRING: Well, this was the area --

THE COURT: So that this is an additional adjudication which --

MR. MARTIN: There is a further problem, Your Honor, too, because the word "finally" was interjected, and I think that's a key word the witness stated, because that implies that there were a lot of other things which never came to light.

MR. GOLDRING: This is what the witness said.

THE COURT: I want to see. Mr. Goldring, I think I am going to have to grant a mistrial.

MR. GOLDRING: Well, Your Honor, as the Court indicated to me prior to this that the witness would be able to reveal testimony, in testimony form, anything that was said to him by Earl Shord. This was a statement made.

THE COURT: This was true, but as to why he wasn't going to get the money.

MR. GREENFIELD: That's right.

MR. GOLDRING: I'm not certain I understood it to be that.

MR. GREENFIELD: He stopped paying because he resigned, period, not resigned because and all that.

MR. GOLDRING: Your Honor, could we have an opportunity to argue this outside of the presence of the jury so I could at least --

THE COURT: Yes.

MR. GOLDRING: Thank you, Your Honor.

(In open court.)

THE COURT: Members of the jury, it is obvious we have reached a difficult point in this case, and the Court has got to consider what happens next; and so we are going to have to have a thorough argument about the situation as it exists right now, and so I think there is no reason why you should be sitting here while we retire into chambers to argue this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 77-138
	)	
EARL W. SHORD and ROGER W. QUIGLEY	)	

ORDER

AND NOW, to-wit, January 24, 1978, for reasons set forth in the accompanying memorandum opinion,

IT IS ORDERED that the motion to dismiss the indictment filed by the defendant Quigley and joined in by the defendant Shord be and the same hereby is denied.

IT IS FURTHER ORDERED that the case be placed upon the next trial list of the undersigned member of the court at Pittsburgh.

/s/ William W. Knox
U. S. District Judge

cc:
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Supreme Court, U. S.
FILED
OCT 25 1978
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No. 78-367

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROGER W. QUIGLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Divans v. *California*, 434 U.S. 1303	8
Lee v. *United States*, 432 U.S. 23	5
McFadyen-Snider v. *United States*, cert. denied, No. 77-1177 (April 24, 1978)	8
Moroyoqui v. *United States*, 570 F.2d 862, cert. denied, No. 77-1375 (April 24, 1978)	7
United States v. *Broderick*, 425 F. Supp. 93	7
United States v. *Buzzard*, 540 F.2d 1383, cert. denied, 429 U.S. 1072	7-8
United States v. *Crouch*, 566 F.2d 1311	7, 11
United States v. *Dinitz*, 424 U.S. 600	5, 6, 7, 11, 12
United States v. *Jorn*, 400 U.S. 470	7
United States v. *Kessler*, 530 F.2d 1246	7, 9, 11
United States v. *King*, No. 78-1286 (8th Cir. Oct. 5, 1978)	11
United States v. *Martin*, 561 F.2d 135	7, 9, 10
United States v. *Scott*, No. 76-1382 (June 14, 1978)	5

Cases—Continued	Page
United States v. *Weaver*, 565 F.2d 129, cert. denied, 434 U.S. 1074	10
United States v. *Wilson*, 534 F.2d 76	8
Wade v. *Hunter*, 336 U.S. 684	12

Constitution and statutes:

United States Constitution, Fifth Amendment, Double Jeopardy Clause	5, 6, 9, 10, 11
18 U.S.C. 1951	2
18 U.S.C. 1952	2
29 U.S.C. 186(b)	2

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. The petition for a writ of certiorari was filed on September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, retrial of petitioner following the district court's declaration of a mistrial at his request is barred by the Double Jeopardy Clause.

STATEMENT

An indictment returned on June 10, 1977, by a grand jury of the United States District Court for the Western District of Pennsylvania charged petitioner and co-defendant Earl W. Shord with demanding and receiving sums of money from contractors through the wrongful use of fear of financial and economic injury, in violation of 18 U.S.C. 1951 and 2 and 29 U.S.C. 186(b). On October 20, 1977, petitioner's trial on these charges terminated with the declaration of a mistrial. Prior to their retrial, petitioner and Shord moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion (Pet. App. 3a-14a) and the court of appeals affirmed (Pet. App. 1a-2a).

To the extent relevant to the issue raised here, the events prior to the declaration of a mistrial were as follows: During the course of construction of a large building in Pittsburgh, Pennsylvania, co-defendant Shord, the business manager of Local Union 5, International Brotherhood of Electrical Workers, and petitioner, the local's business agent, demanded and received various sums of money from a contractor through fear of economic and financial injury resulting from labor difficulties at the building project.

Pursuant to an agreement with petitioner and Shord, the contractor made the payments to petitioner and to the union's attorney, William Murray, who in turn disbursed the money to Shord in installments (Pet. App. 3a-5a).

Murray was named as an unindicted co-conspirator and testified for the government under immunity. When Murray was asked on direct examination why payments to Shord had ceased on August 20, 1975 (Pet. App. 15a), counsel for petitioner requested a bench conference, indicating that he would like an offer of proof as to the question's relevancy. Government counsel stated that Murray would testify that around that time Shord had been removed from union office and thus was no longer in a position to receive money from the contractor. The prosecutor indicated that Murray would further testify that following Shord's removal from office, Shord had inquired of him, "I guess this means I won't get the other $4,500" (Pet. App. 16a). In response to the concern expressed by defense counsel that any testimony concerning Shord's removal from office would be highly prejudicial because it would imply that the union had made a judgment about Shord's guilt in this matter, the court ruled that it would not admit any testimony as to Murray's knowledge of the union's investigation of Shord or of Shord's resignation, but that it would allow Murray to testify about any statements that Shord himself had made to him (Pet. App. 18a-19a). The prosecutor informed the court that he was not certain precisely what Murray's tes-

timony would be in light of this ruling and requested a recess "[o]ut of an abundance of caution" in order to make that determination (Pet. App. 19a).

Following the recess, government counsel asked a series of questions designed to elicit what Shord had said to Murray immediately prior or subsequent to receiving the last payment (Pet. App. 19a-22a). Murray replied that Shord had told him that he had been removed from office and had stated, "I guess this means that I won't get the remainder of my money" (Pet. App. 23a). The prosecutor then asked Murray:

> Q. Did [Shord] say something to the effect, "They finally got me on this one," or anything of that—
>
> A. He says that, "Finally—

Defense counsel immediately objected and requested a mistrial on the grounds that the government's question was leading and prejudicial. During the ensuing conference held on the mistrial motion, the prosecutor informed the court (Pet. App. 23a-24a) that he had gone over the testimony with Murray very carefully during the recess and was certain that Murray would testify that Shord had made that exact statement to him. The prosecutor explained that he had attempted unsuccessfully to elicit this response from Murray before asking the leading question and that it was his understanding of the court's ruling that he would be allowed to bring out any statements Shord had made to Murray concerning these events (Pet. App.

27a-28a; Tr. 382). The district court concluded that the prejudicial effect of Murray's testimony, which tended to show that Shord had been removed from union office as a result of the very conduct that was the subject of the indictment, could not be cured by cautionary instructions, and it accordingly granted petitioner's and Shord's motion for a mistrial (Tr. 405).

ARGUMENT

1. Petitioner contends (Pet. 16-35) that, in light of the district court's warning to the prosecutor that any testimony by Murray concerning the union's prior investigation of Shord's involvement in this matter would be prejudicial, the government's subsequent questioning of Murray amounted to "prosecutorial overreaching" and that a retrial is therefore prohibited by the Double Jeopardy Clause. Petitioner concedes, however (Pet. 19), as he must, that unlike the situation in which the court orders a mistrial over the defendant's objection, in which event a retrial would be prohibited unless the mistrial declaration was warranted by "manifest necessity," when the mistrial has been declared at the defendant's request the bar to a retrial is generally removed. *United States* v. *Scott*, No. 76-1382 (June 14, 1978), slip op. 10-11; *Lee* v. *United States*, 432 U.S. 23 (1977); *United States* v. *Dinitz*, 424 U.S. 600 (1976). As this Court explained in *Dinitz* (424 U.S. at 608):

> The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is

> wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn* [400 U.S. 470, 484 (1970)]. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

At the same time, the Court has suggested that a second trial may be barred by the Double Jeopardy Clause even after a mistrial declared at a defendant's request, in the event of deliberate prosecutorial misconduct calculated to provoke a mistrial motion and thereby to subject the defendant to a successive prosecution in which the government might have a more favorable opportunity to obtain a conviction. See

United States v. *Dinitz*, *supra*, 424 U.S. at 611; *United States* v. *Jorn*, 400 U.S. 470, 485 n.12 (1970).

Thus, where a prosecutor has introduced into evidence "a known false exhibit" (*United States* v. *Kessler*, 530 F.2d 1246, 1257 and n.21 (5th Cir. 1976)), read to the jury irrelevant and highly prejudicial portions of the defendant's grand jury testimony despite prior assurances to the district court that such material had been excised (*United States* v. *Martin*, 561 F.2d 135 (8th Cir. 1977), or breached a specific agreement not to present certain evidence (*United States* v. *Broderick*, 425 F. Supp. 93 (S.D. Fla. 1977)), the courts have held that such deliberate misconduct amounted to prosecutorial overreaching and that a second prosecution was prohibited following the declaration of a mistrial at the defendant's behest.[1] On the other hand, the courts have concluded that errors by the prosecutor do not constitute overreaching, and hence do not prevent a retrial following the declaration of a mistrial, in the absence of evidence of an "evil motive" on the part of the government. See *Moroyoqui* v. *United States*, 570 F.2d 862, 864 (9th Cir. 1977), cert. denied, No. 77-1375 (April 24, 1978); *United States* v. *Crouch*, 566 F.2d 1311, 1316-1321 (5th Cir. 1978); *United States* v. *Buzzard*, 540 F.2d 1383, 1387 (10th Cir. 1976), cert. denied,

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[1] We have serious reservations about the correctness of these decisions under the circumstances presented in the particular cases. Since, however, as discussed below, petitioner would not have prevailed even in the Fifth or Eighth Circuits, this case presents no occasion for examination of the propriety of the results in *Kessler* and *Martin*.

429 U.S. 1072 (1977); *United States* v. *Wilson*, 534 F.2d 76 (6th Cir. 1976). In sum, "[i]n order to elevate * * * a typical order [declaring a mistrial] into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, * * * but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial." *Divans* v. *California*, 434 U.S. 1303 (1977) (Rehnquist, Circuit Justice).[2]

Petitioner has made no such showing here of intentional prosecutorial misconduct designed to force a mistrial. To begin with, any "overreaching" by the government concerned Shord alone and could not have prejudiced petitioner. Moreover, in asking Murray the leading question found to be objectionable, the prosecutor believed in good faith that he was complying with the court's earlier ruling that anything Shord had said to Murray would be admissible. As the district court pointed out in denying petitioner's motion to dismiss the indictment (Pet. App. 13a-14a):

> [I]t is apparent that the government here has not been guilty of prosecutorial overreaching or bad faith or the purpose of deliberately prejudicing the defendants or provoking them into making a motion for mistrial so that the government could try again another day to convict them in a case that was going badly. As a matter of fact, the evidence already produced by the government showed a course of conduct which would have justified a conviction.
>
> Rather, the court appraises the situation which resulted here as a case of inadvertence by the prosecutor coupled perhaps with some confusion as to exactly what the court's ruling prior to lunch had indicated as permissible and the resulting conference between government's counsel and the witness, an attorney, had left him in doubt as to how far he could go. For this reason he was hesitant to respond to the government's questions and this in turn led to the leading questions which should not have been asked and which brought out the very thing which the court had ruled was improper except as admissions and statements from the defendant, to wit: a showing that the international union had removed this official for this very conduct which was being considered by the court and jury in this case.

[2] We have discussed this matter at greater length in our brief in opposition to the petition for a writ of certiorari in *McFadyen-Snider* v. *United States*, cert. denied, No. 77-1117 (April 24, 1978), a copy of which we are providing to petitioner.

This factual finding, affirmed by the court of appeals, does not warrant further review.

2. Petitioner alleges further (Pet. 39-41) that the standard used by the district court for determining whether the prosecutorial error was of the sort that bars a retrial conflicts with that announced by the Fifth and Eighth Circuits in *United States* v. *Kessler*, *supra*, and *United States* v. *Martin*, *supra*. According to petitioner (Pet. 39), the courts below "would grant relief pursuant to the Double Jeopardy Clause of the Fifth Amendment only upon a showing

that the prosecutor, in causing the mistrial, acted in bad faith or that his conduct was willful and intentional," whereas the Fifth and Eighth Circuits do not require a finding of "intentional misconduct."

An examination of the cases on which petitioner relies reveals that there is no conflict. As noted above, *United States* v. *Martin*, *supra*, involved the prosecutor's reading to the jury the transcript of the defendant's grand jury testimony, which contained irrelevant and highly prejudicial remarks made by grand jurors, after assuring the court that the irrelevant statements had been excised. The district court, at the defendant's request, declared a mistrial. In considering defendant's claim that his retrial was barred by the Double Jeopardy Clause, the court of appeals remarked (561 F.2d at 139), "[a]lthough mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*, if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found." It then found that the government's actions amounted to "more than mere prosecutorial negligence" and could "best be described as prosecutorial error undertaken to harass or prejudice the defendant—prosecutorial overreaching." The Eighth Circuit has been even more explicit in a later case, *United States* v. *Weaver*, 565 F.2d 129, 133 (1977), cert. denied, 434 U.S. 1074 (1978), holding that "[o]nly in limited circumstances, where the judicial or prosecutorial error that prompts the defendant's [mistrial] motion is intended to provoke

the motion or is otherwise motivated by bad faith or undertaken to harass or prejudice the defendant, does the double jeopardy clause bar retrial." See also *United States* v. *King*, No. 78-1286 (8th Cir. Oct. 5, 1978), slip op. 5-6.

The Fifth Circuit has taken the same approach. In *United States* v. *Kessler*, *supra*, the prosecution, in addition to soliciting inadmissible hearsay declarations from a witness, introduced into evidence an automatic rifle that it knew to be a false exhibit. The court of appeals held that, despite defendants' having moved for a mistrial, they could not be retried consistent with the Double Jeopardy Clause. The court stated that "[t]o find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction' " (530 F.2d at 1256; footnote omitted), and found that the government was guilty of intentional misconduct in introducing the rifle (*id.* at 1257). In a subsequent case, *United States* v. *Crouch*, *supra*, the Fifth Circuit restated the test to be used in such cases: "[T]he defendants may be retried unless the mistrial motion was prompted by error 'motivated by bad faith or undertaken to harass or prejudice' " (566 F.2d at 1317, quoting from *United States* v. *Dinitz*, *supra*, 424 U.S. at 600).

Thus, since the prosecutor's conduct in this case did not rise to the level of "gross negligence or inten-

tional misconduct" designed to precipitate a mistrial, petitioner's retrial would not be barred in any circuit.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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[8] Petitioner also asserts (Br. 36-39) that he was not exercising a free choice when he joined in co-defendant Shord's motion for a mistrial, since if he had failed to join in the motion he would have waived the issue in the event that the motion was denied. This contention is specious, since petitioner could have noted his objection while insisting on his "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Petitioner's position was no different than if he had stood trial alone and been confronted with the choice of either moving for a mistrial or proceeding with the trial and facing the prospect of a probable conviction followed by an appeal, a reversal of the conviction and a later retrial. See *United States* v. *Dinitz*, *supra*, 424 U.S. at 609.

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